Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In The

# Supreme Court of the United States

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Frederick Feied,

*Petitioner*,

v.

The Regents of the University of California;
California Public Employees' Retirement System,

*Respondents*.

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On Petition for Review
To The California Supreme Court[1]

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## APPENDIX IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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CA Supreme Court No. S146281
CA Ct. Of Appeal No. A112481
CA Superior Ct., Alameda County No. RG05212623

## TABLE OF CONTENTS

"FEIED - III" - CA SUPREME COURT DENIAL OF PETITION FOR REVIEW, 11/1/06 ..... 1

"FEIED III" - CAPTION PAGE, PETITION FOR REVIEW TO CA SUPREME COURT, 9/1/06 ..... 2

"FEIED III" APPELLATE OPINION, CA COURT OF APPEAL, 7/24/06 ..... 3

"FEIED III" - APPELLANT'S OPENING BRIEF, RELEVANT PAGES, 3/1/06 ..... 15

"FEIED III" - AMENDED COMPLAINT, ALAMEDA COUNTY SUP. CT, CA, 7/1/05 ..... 20

"FEIED II" APPELLATE OPINION, NINTH CIRCUIT, 6/20/06 ..... 37

"FEIED I" - CA SUPREME COURT DENIAL OF PETITION FOR REVIEW, 6/9/04 ..... 58

"FEIED I" APPELLATE OPINION, CA COURT OF APPEAL, 3/2/04 ..... 45

SUPREME COURT
FILED
NOV - 1, 2006
Frederck K. Ohlrich Clerk
DEPUTY

Court of Appeal, First Appellate District, Div. 4 - No. A112481

**S146281**

# IN THE SUPREME COURT OF CALIFORNIA

**En Banc**

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FREDERICK FEIED, Plaintiff and Appellant,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
et al., Defendants and Respondents.

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Petition for review DENIED.

**GEORGE**
Chief Justice

SUPREME COURT
FILED
SEPT - 1, 2006
Frederck K. Ohlrich Clerk

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

| | |
|---|---|
| FREDERICK FEIED,<br>Plaintiff and Appellant,<br><br>vs.<br><br>THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,<br><br>Defendants and Respondents | COURT OF APPEAL<br>NO. A112481<br><br>(Alameda County Super. Ct. No. RG-05212623) |

# PETITION FOR REVIEW BY APPELLANT FREDERICK FEIED

**From the Opinion of the Court of Appeal**
**First Appellate District, Division Four**

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California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

Court of Appeal, First District, Division 4, California.

Frederick FEIED, Plaintiff and Appellant,
v.
The REGENTS OF the UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents.

No. A112481.
(Alameda County Super. Ct. No. RG-05212623).

July 24, 2006.

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RUVOLO, P.J.

## I.
## INTRODUCTION

This appeal represents the latest attempt by plaintiff Frederick Feied to seek retirement benefits from The Regents of the University of California (Regents), the University of California

Retirement System (UCRS), and the California Public Employees' Retirement System (PERS), stemming from his employment at the University of California Berkeley (UC) and California State University, San Jose (CSU).

We previously affirmed an order dismissing plaintiff's breach of contract action against Regents and PERS, on the grounds that the claims were barred by the statute of limitations ( Feied v. Regents of the University of California et al. (Mar. 2, 2004, A102968) [nonpub. opn.] [ Feied I ] ). Following our decision in Feied I, plaintiff recast his claims as a civil rights action and filed a complaint in federal district court ( Feied v. The Regents of the University of California et al. (N.D. Cal.2004 No. C 04-02618 SBA) [ Feied II ] ). The federal court concluded that plaintiff's action was time-barred, as well as precluded by the Eleventh Amendment. Undaunted by this dismissal, plaintiff restyled his claims as a negligence action and filed yet another complaint in state court ( Feied v. The Regents of the University of California et al. (Alameda County Super. Ct. (2005) No. RG05212623) [ Feied III ] ). The instant challenge comes to us from the judgment dismissing Feied III, following the sustaining of demurrers without leave to amend. We affirm.

## II.
## FACTUAL AND PROCEDURAL BACKGROUNDFN1

FN1. Because this appeal is from the sustaining of a demurrer, we take the facts recited in plaintiff's complaint as true. ( Blank v. Kirwan (1985) 39 Cal.3d 311, 318.)

Plaintiff worked for UC from 1965 to 1969 and from 1976 to 1978. He worked for CSU from 1970 through 1975. Based on this employment history, plaintiff seeks retirement benefits from PERS (for employment at CSU) and Regents and UCRS (for employment at UC).

In the "late 1990's[,]" plaintiff initiated administrative proceedings with Regents regarding his UCRS benefits. Regents told plaintiff he was not entitled to benefits because UCRS only allowed benefits to employees transferring in from employment with the State of California. At the time, plaintiff was not on the PERS retirement roll due to PERS's prior refusal to pay benefits to plaintiff.

In 1996, 12 years after it had denied payment, PERS paid plaintiff approximately $29,390 in retirement benefits. PERS, however, did not pay plaintiff interest or capitalization for the 12-year period during which his benefits were withheld. Following the payment by PERS, plaintiff once again pursued administrative proceedings to obtain UCRS benefits. Regents informed plaintiff that he did not qualify for benefits because, in 1980, he elected to take a refund of UCRS benefits. When plaintiff objected that any refund paid to him would have been the result of PERS's initial denial of benefits, Regents allegedly "abandoned" its "buyout defense," and denied benefits because plaintiff failed to meet the reciprocity conditions set forth in Article 12.08 of the University of California Retirement Plan (Article 12.08).FN2 According to Regents, in order to establish reciprocity between UCRS and PERS, plaintiff had to become a member of UCRS within 180 days of termination of employment with his previous PERS employer. Regents determined that plaintiff was not eligible for reciprocity because he was not employed by UC within 180 days after termination of his employment with CSU. Relying on Regents' interpretation of Article 12.08, plaintiff did not pursue any further redress. However, five years later, after discussing the matter with an attorney, plaintiff concluded Regents had misinterpreted Article 12.08.

FN2. Article 12.08 provided, in pertinent part, as follows: "An

employee who becomes an Active Member of this ··· Plan within 180 days of termination of employment where such a Member was a member of PERS (except those employees who are members of PERS on account of University employment) shall be entitled to the following provided that the contributions have remained on deposit with PERS and the Member retires concurrently under both plans····"

A.
Feied I

*2 In June 2002, plaintiff filed an amended complaint in Alameda County Superior Court against Regents and PERS, alleging breach of contract. After sustaining general demurrers and granting motions for judgment, the trial court dismissed the first amended complaint on the grounds that plaintiff's breach of contract claim "accrued-at the latest-in 1996" and was time-barred under any applicable statute of limitations.

We affirmed the judgment dismissing plaintiff's complaint in Feied I. We held plaintiff's breach of contract claim against PERS was time-barred. In so holding, we specifically rejected plaintiff's claim that Government Code section 20614, subdivision (b)(2) provided a safe harbor from the applicable statute of limitations. ( Feied I at pp. 4-6.) Government Code section 20614, provides, in relevant part, as follows: "[¶] (b) For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years, and shall be applied as follows: [¶] (1) In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment. [¶] (2) In cases where this system owes money to a member or beneficiary, the period of limitations shall not

apply." We adopted PERS's interpretation that Government Code section 20164 applied only to claims against PERS "based upon errors or omissions." ( Feied I at p. 6.) Applying this interpretation, we concluded that refusal to pay interest or capitalization could not be characterized as an error or omission because it was undisputed that plaintiff began receiving pension payments from PERS in 1996, following a " 'lengthy administrative review process." ( Ibid.) Accordingly, "[f]ixing the amount of those payments was clearly the measured result of a deliberate decision-making process." ( Ibid.)

In denying plaintiff's breach of contract claim against Regents, we implicitly rejected plaintiff's argument that his claim was exempt from the statute of limitation under Government Code sections 20353 FN3 and 20164, and held the breach of contract claim was time-barred. ( Feied I at pp. 4-5.) In so holding, we concluded plaintiff's entitlement to his retirement benefits, whether accrued in 1978 or 1984, was " 'well outside the three year statute of limitations applicable to claims based on statute ( Code [ ] Civ. Proc., § 338(a)) or the four year statute of limitations applicable to breach of contract claims ( Code [ ] Civ. Proc., § 337).)' " ( Id. at pp. 5-6.) We denied plaintiff's petition for rehearing. Plaintiff also filed a petition for review with the California Supreme Court, which was denied on June 9, 2004.

FN3. Government Code section 20353 pertains to reciprocity among retirement systems, and provides, in pertinent part, as follows: "Any public agency that has pursuant to the provisions of Section 20351 entered into an agreement to establish a reciprocal retirement system with this system shall be deemed to have obtained the same rights and limitations with respect to all other public agencies who have entered into those agreements and established reciprocity····"

B.

Feied II

On June 29, 2004, plaintiff filed a civil rights action in federal court against Regents and PERS, claiming an unlawful taking under the Fifth and Fourteenth Amendments, and again seeking interest and capitalization regarding the retroactive benefits PERS had agreed to pay in 1996. The district court granted the motions to dismiss filed by PERS and Regents. The district court concluded plaintiff's civil rights claim against PERS and Regents was barred by the applicable statute of limitations. In so ruling, the district court determined plaintiff was injured in 1996, when PERS allegedly failed to pay him interest and/or capitalization on his retirement benefits from 1984 to 1996. The district court also ruled that Regents is an instrumentality of the state entitled to immunity under the Eleventh Amendment. In an unpublished opinion, the Ninth Circuit recently affirmed the district court's ruling in its entirety. ( Feied v. The Regents of the University of California (9th Cir. June 20, 2006) No. 04-17523 (2006 WL 1737173) .)

C.

Feied III

*3 On July 1, 2005, plaintiff filed a rambling, essay-like complaint against PERS and Regents for negligence and injunctive relief directing the payment of his retirement benefits with interest and capitalization. Plaintiff alleged PERS was negligent in leaving plaintiff "off its retirement rolls for 12 years or more" and this purported negligence was the proximate cause for Regents denying retirement benefits. Plaintiff's negligence claim against Regents is somewhat difficult to decipher. The factual basis for the claim is an April 12, 2005 letter, in which Regents informed plaintiff that he was not entitled to retirement benefits because he had elected to receive a refund of his contributions to his Regents plan. From

what can be discerned from the complaint, the allegations against Regents are as follows: (1) Regents owed plaintiff a duty to inform him of the "actual reasons" his retirement benefits had been denied; (2) Regents breached this duty by failing to inform him that it had not abandoned its "buyout defense;" (3) breach of this duty caused plaintiff to believe no benefits were owed and to cease further redress for several years; (4) plaintiff reasonably and justifiably relied on Regents' administrative determination; (5) Regents is estopped from arguing that a reasonable plaintiff, similarly situated, would have known of Regents' error at an earlier date, because Regents, itself, did not know of the error; and (6) plaintiff has suffered damages "in that he has lost his retirement benefits, including the present-day cash value of the benefits and losses, and a continued loss of benefits which is ongoing."

The trial court sustained the demurrers filed by PERS and Regents, without leave to amend. The court dismissed the action on several grounds, including that: the claims against Regents and PERS were "clearly barred by all applicable statutes of limitation." This timely appeal followed.

## III.
## DISCUSSION

### A.
### Standard of Review

On appeal following an order sustaining a demurrer and dismissal, our standard of review is de novo; that is, we exercise our independent judgment about whether the complaint states a cause of action as a matter of law. ( Moore v. Regents of University of California (1990) 51 Cal.3d 120, 125.) Our task is well settled. "The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.]

The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation .] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" ( Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 966-967; Palm Springs Tennis Club v. Rangel (1999) 73 Cal.App.4th 1, 4-5.)

*4 While a decision to sustain a demurrer is subject to de novo review, a grant or denial of leave to amend calls for an exercise of discretion on the part of the trial court. ( Hendy v. Losse (1991) 54 Cal.3d 723, 742; Hernandez v. City of Pomona (1996) 49 Cal.App.4th 1492, 1497.) Therefore, to the extent the denial of leave to amend is an issue, it is reviewed for abuse of discretion. ( Aubry v. Tri-City Hospital Dist., supra, 2 Cal.4th at p. 967.)

B.

Plaintiff's Negligence Claim Against PERS is Barred Under Any Applicable Statute of Limitations

" 'Statute of limitations' is the 'collective term ··· commonly applied to a great number of acts,' or parts of acts, that 'prescribe the periods beyond which' a plaintiff may not bring a cause of action. [Citations.] It has as a purpose to protect defendants from the stale claims of dilatory plaintiffs. [Citations.] It has as a related purpose to stimulate plaintiffs to assert fresh claims against defendants in a diligent fashion. [Citations.]" ( Norgart v. Upjohn Co. (1999) 21 Cal.4th 383, 395.)

"Under the statute of limitations, a plaintiff must bring a cause of action within the limitations period applicable thereto after accrual of the cause of action. [Citations.] [¶] The general rule for defining the accrual of a cause of action sets the date as the time 'when, under the substantive law, the wrongful act is done,' or the wrongful result occurs, and the consequent 'liability arises.' [Citation.] In other words, it sets the date as the time when the cause of action is complete with all of its elements [citations]-the elements being generically referred to by sets of terms such as 'wrongdoing' or 'wrongful conduct,' 'cause' or 'causation,' and 'harm' or 'injury' [citations]." ( Norgart v. Upjohn Co., supra, 21 Cal.4th at p. 397.)

In the instant case, plaintiff's negligence claims against PERS arose out its alleged failure to acknowledge that he was a member of PERS, which then caused Regents to deny him retirement benefits.1996 is clearly established as the year this claim accrued. In 1996, PERS acknowledged plaintiff was a member and agreed to pay his retroactive retirement benefits, without interest or capitalization. Thus, plaintiff's negligence claim is well outside the one-year period established by former Code of Civil Procedure section 340, subdivision (3) or the two-year period prescribed by current Code of Civil Procedure section 335.1. The cause of action against PERS was time barred and the trial court did not err in reaching the same conclusion.

To the extent plaintiff is again asserting he is exempt from the statute of limitations under section 20164, subdivision (b)(2), our decision in Feied I precludes further review of this issue. The doctrine of res judicata applies to both a previously litigated cause of action, known as claim preclusion, as well as to an issue which was necessarily decided in a prior action, known as issue preclusion. ( Vandenberg v. Superior Court (1999) 21 Cal.4th 815, 828.) Issue preclusion arises where a previously litigated issue is raised in a subsequent action on a

different claim, known as collateral estoppel, as well as where an issue is raised in later action on the same claim, known as direct estoppel. (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 285, p. 826.) Here, plaintiff has already argued and lost on the issue of whether there is a statute of limitations on his retirement benefits claim.FN4 Thus, he is directly estopped from raising this issue again. ( MIB, Inc. v. Superior Court (1980) 106 Cal.App.3d 228, 232; see also Smith v. Smith (1981) 127 Cal.App.3d 203, 208; Sabek, Inc. v. Englehard Corp. (1998) 65 Cal.App.4th 992, 997.)

FN4. Plaintiff claims we should "modify" our decision in Feied I, and hold that PERS's deliberate decision to withhold interest and capitalization is sufficient to trigger the statute of limitations exemption in section 20164, subdivision (b)(2). Our decision in Feied I has long since been final and is not subject to modification. (Cal. Rules of Court, rules 24(b)(2), 25). To the extent plaintiff relies on Code of Civil Procedure section 128.7, subdivision (b)(2) to seek a modification in existing law, his reliance is misplaced. Nothing in that Code of Civil Procedure section 128.7, subdivision (b)(2) provides authority for the modification of prior judicial decisions.

*5 The doctrine of direct estoppel has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party and of promoting judicial economy by preventing needless litigation. ( Sabek, Inc. v. Engelhard Corp., supra, 65 Cal.App.4th at p. 997.) These very goals of the doctrine were furthered by the trial court's order sustaining the sustaining PERS's demurrer without leave to amend.FN5

FN5. As there is no reasonable possibility that plaintiff can state a timely cause of action against PERS, the trial did not abuse it discretion sustaining the demurrer without leave to amend.

C.

The Complaint Fails to Allege an Actionable Negligence Claim Against Regents

"A tort, whether intentional or negligent, involves a violation of a legal duty, imposed by statute, contract, or otherwise, owed by the defendant to the person injured." (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 6, pp. 48-49, italics omitted; Romero v. Superior Court (2001) 89 Cal.App.4th 1068, 1078.) Without such a duty, any injury is injury without wrong. (5 Witkin, supra, § 6, p. 49; Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 57-58 [duty is threshold element of cause of action for negligence].) "The existence and scope of duty are legal questions for the court····" ( Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465, 477; Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666, 674.)

Here, the complaint alleges plaintiff was misled by Regents when it denied his claim for retirement benefits without telling him the "actual reasons" for its decision. Plaintiff provides no authority, nor can any be found by this court, for his assertion that Regents had a duty to inform him of the "actual reasons" his retirement benefits had been denied. As no legal authority for this purported duty exists, any harm alleged by plaintiff is an injury without a wrong. In sum, the complaint fails to allege a cognizable legal duty on the part of Regents and the trial court did not err in reaching the same conclusion.FN6

FN6. By reason of our conclusion that the complaint fails to state an actionable claim of negligence against Regents, we do not address the numerous other arguments advanced by plaintiff. Specifically, plaintiff argues at length about whether Regents is immune from tort liability. However, this argument presupposes that Regents has breached a legal duty owed to

plaintiff. Inasmuch as we conclude that plaintiff has failed to allege any cognizable legal duty on the part of Regents, we do not address whether Regents is immune from tort liability.

## IV.
## DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendants.

We concur: SEPULVEDA and RIVERA, JJ.

**FILED**
MAR - 1 2006
Court of Appeal - First App. Dist.
By DIANA HERBERT
DEPUTY

**COURT OF APPEAL OF THE STATE OF CALIFORNIA**
**FIRST APPELLATE DISTRICT**
**DIVISION FOUR**

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|---|---|
| FREDERICK FEIED,<br>Plaintiff and Appellant,<br><br>vs.<br><br>THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, THE STATE OF CALIFORNIA; THE UNIVERSITY OF CALIFORNIA RETIREMENT SYSTEM (a.k.a. "UCRS"); CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM (a.k.a. California PERS),<br><br>Defendants and Respondents. | A112481<br><br>(Alameda County Superior Court No. RG05212623 |

# APPELLANT'S OPENING BRIEF

On Appeal from Judgment of the Alameda County
Superior Court
Sustaining Demurrers Without Leave to Amend
The Honorable Steven A. Brick Presiding

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[From page 26 of Appellant's Opening Brief]

4. Government Code section 818.8 does not extend immunity to REGENTS from a suit for the recovery of retirement benefits owed under UCRP. The benefits are monies that belong to the claimant. Applying immunity would result in an unconstitutional taking of plaintiff's property without payment of just compensation, in violation of the Fifth Amendment to the U.S. Constitution.

[From page 31 of Appellant's Opening Brief]

All factors considered, it is possible that REGENTS is actually "independent of the State" with regard to the administration of its retirement program. REGENTS naturally seeks to enjoy the best of both worlds, but in doing so it violates the principle of judicial estoppel. REGENTS cannot claim to be simultaneously "an arm of the State" and "independent of the State" at the same time with regard to the same administrative function. This sort of doublespeak tends to undermine the very basis of the due process and equal protection provisions of U.S. Const., Amendment 14. Substantive due process is undermined because there can be no "meaningful review" when REGENTS evades Federal Court jurisdiction in one forum by arguing it is "the State," and evades liability in State Court by arguing it is "independent of the State."[1]

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[1] *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) explains that substantive due process provides the opportunity to be heard "at a meaningful time

Equal protection (*Barton v. City of Bristol*, 294 F.Supp.2d 184,195) is violated because the laws clearly are not applied equally when in the Federal Court REGENTS is treated as "the State" so as to enjoy Eleventh Amendment immunity, and in State Court it is treated as "independent of the State" to enjoy exclusion from Gov. Code § 20164. Equal protection is also violated because in the State Court proceedings underlying this appeal, REGENTS the Government Codes were applied to protect Regents from liability ( § 818.8), while they were *not applied* when it came to Dr. Feied's claims against REGENTS ( § 20164).

[From pages 33-34 of Appellant's Opening Brief]

## V. APPLICATION OF GOVERNMENTAL IMMUNITY WOULD ABRIDGE DR. FEIED'S FIFTH AMENDMENT RIGHTS

REGENTS demurred on grounds that it enjoyed immunity as a State Sovereignty under Gov. Code § 818.8 (adx. 32-33). The Trial Court made a mistake in applying immunity to REGENTS (adx. 9). Dr. Feied's retirement pension is *his* money, wrongfully withheld by REGENTS. The Fifth Amendment of the U.S. Constitution prohibits a state from taking the peoples' property without payment of just compensation so the State may not enact immunity statutes that permit it to do so.

## VI. BECAUSE REGENTS SUCCESSFULLY

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and in a meaningful manner."

**ASSERTED IT IS "INDEPENDENT OF THE STATE" WITH REGARD TO THE ADMINISTRATION OF ITS RETIREMENT PROGRAM, § 818.8 IMMUNITY CANNOT APPLY TO REGENTS**

If the Fifth Amendment did not apply, then REGENTS could only enjoy immunity under Gov. Code § 818.8 if it were functioning in the capacity of "the State," and not as an independent entity (supra). Here, by asserting immunity under § 818.8, REGENTS has once again taken the position that it is an "arm of the State" with regard to the administration of its retirement program, consistent with the position it took in Federal Court.

The doctrine of Judicial Estoppel should apply to estop REGENTS from asserting the conflicting position that it is "independent of the State" with regard to the administration of its retirement program.

Immunity under § 818.8 only applies when no other statute establishes a right to make the claim asserted, and recovery of retirement benefits is statutorily exempt from any statute of limitations per Gov. Code § 20164(b)(2). Dr. Feied has the same right of action against REGENTS as he does against PERS.

FILED
JUL 1 - 2005
CLERK OF THE SUPERIOR COURT
By Margaret J. Downie

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Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA
UNLIMITED JURISDICTION

FREDERICK FEIED,
Plaintiff,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, THE STATE OF CALIFORNIA; THE UNIVERSITY OF CALIFORNIA RETIREMENT SYSTEM (a.k.a. "UCRS"); CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM (a.k.a. California PERS); Does 1 through 10 inclusive,

Defendant.

Case Number: **RG05212623**

**AMENDED** COMPLAINT FOR (1) NEGLIGENCE and; (2) INJUNCTIVE RELIEF DIRECTING PAYMENT OF STATUTORILY-OWED RETIREMENT BENEFITS

## PRELIMINARY STATEMENT

Plaintiff returns to this Court with his substantive claims after they had been dismissed on statute of limitations grounds on June 5, 2003, and following a subsequent series of events transpiring in the State Court appeal and Federal Court adjudication of various matters which have redefined this action. Under California law, a dismissal of an action on statute of limitations grounds is not a final judgment on the merits, and the doctrine of res judicata does not apply, as explained in *Kock v. Rodlin Enterprises, Inc.* (1990) 223 Cal.App.3d 1591, 273 Cal.Rptr. 438:

Termination of an action by a statute of limitations is deemed a technical or procedural, rather than a substantive, termination. (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 751, 159 Cal.Rptr. 693, 602 P.2d 393.) "Thus the purpose served by dismissal on limitations grounds is in no way dependent on nor reflective of the merits--or lack thereof--in the underlying action." (*Id.,* at pp. 751-752, 159 Cal.Rptr. 693, 602 P.2d 393.) (*Id.* at 441,1596.)

In the Course of the related appeal, the First District Court of Appeal found that defendant REGENTS was "independent of the State of California" and therefore certain statute of limitations provisions applicable to the State of California's retirement program (PERS) did not apply to REGENTS. However, in the Federal Court proceedings, REGENTS changed its position entirely and asserted that it was now "the State of California" so as to entitle it to protection under the Eleventh Amendment to the United States Constitution, and prevailed. Accordingly, now REGENTS' status as "the State of California" with regard to its administration of its

retirement program has been established as a matter of law as well as by REGENTS' own admission on its pleadings. In the course of those proceedings, on April 12, 2005, REGENTS disclosed to Plaintiff what appeared to have been the true reason it denied him retirement benefits upon which this lawsuit is premised, and based on this recent disclosure as well as events that transpired in the course of the earlier litigations, it became clear that REGENTS negligently mislead PLAINTIFF into believing that he was not entitled to retirement benefits so as to cause him to abandon any and all further pursuit of his claims for such a long period of time that his statute of limitations to bring an action for recovery of his benefits appeared to have been lost. A new and separate adjudication of these matters is required because the matters are outside of the record of all earlier proceedings.

As a separate matter, Plaintiff also exercises his right under Cal. Code Civ. Proc. § 128.7 (b)(2) to move for the modification of existing law or the establishment of new law directing that when underlying facts and events are uncommonly complex and unusual to such an extent that the reasonable person similarly situated as the plaintiff may fail to file a timely action within the statute of limitations time period proscribed for Plaintiff's claims, an exception to the statute of limitations should apply establishing that the statute tolls until it becomes clear that the wrongful conduct of the defendant is unequivocally ascertainable to the reasonable person similarly situated as the plaintiff. In this instance, the negligent acts of the defendants were not even ascertainable to defendants themselves at any earlier date, and are still not ascertainable to them, as further described below, therefore it would be inequitable to expect the plaintiff to be held to have known of the wrongful acts prior to the

date of his actual discovery of same. Plaintiff revealed his awareness of the defendants' errors in the form of a "suspicion of negligence" in June of 2002 when he presented his allegations based on his information and belief in the earlier Superior Court action (Case No. 2002-053902), then confirmed as an actual and unequivocal ascertainment of negligence on April 12, 2005 upon receipt of a letter from REGENTS (exhibit A hereto). In determining whether existing law should be modified or new law should be established, the Court will find that under California Government Code section 20164 a plaintiff's action for recovery of public and quasi-public retirement is statutorily exempted from any period of limitations, and that section 20164 either actually applies to all of the defendants herein, or should be deemed to apply to all of the named defendants. In all likelihood this Court will probably find that (1) there is no need to modify existing law because section 20164 already applies; and (2) Plaintiff's action is timely as ascertained from the facts discovered and matters of law established in the course of the Federal Court proceedings.

**GENERAL ALLEGATIONS**

1. Defendant, the REGENTS OF THE UNIVERSITY OF CALIFORNIA (hereinafter "REGENTS") was, at all times relevant herein, a State-Chartered University with a campus located in the City of Berkeley, California, and with its headquarters located at 300 Lakeside Drive, in the City of Oakland, California.

2. Defendant, the UNIVERSITY OF CALIFORNIA RETIREMENT SYSTEM "hereinafter "UCRS" or "ADMINISTRATOR") was, at all times relevant herein, REGENTS' retirement system administration department which governs, controls, and administers retirement programs for the employees of

REGENTS.

3. As established by the Federal Court, Defendant, the STATE OF CALIFORNIA, is deemed to be one and the same with REGENTS pursuant to an order dated December 14, 2004, issued from the United States District Court for the Northern District of California in Feied v. Regents, case number C04-02618 SBA. (The Federal Court order extended Eleventh Amendment immunity to REGENTS on grounds that it found REGENTS to be "an arm of the State of California" with regard to the administration of its retirement benefits. Accordingly, REGENTS and the State of California are deemed to be one and the same as a matter of law.)

4. CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM ("hereinafter PERS") was, at all times relevant herein, a State retirement benefits agency in charge of administration and distribution of retirement benefits to employees of the State of California.

5. Plaintiff, DR. FREDERICK FEIED (hereinafter "FEIED" or "plaintiff"), is an 83-year old retiree who qualified for retirement benefits under REGENTS' and UCRS' retirement plan, the "University of California Retirement Plan (hereinafter "UCRP"), by virtue of his employment for several years with REGENTS.

6. The true names and capacities, whether individual, corporate, associate or otherwise of Defendants sued herein as DOES 1 through 50 inclusive, are unknown to plaintiff, who therefore sues said Defendants by such fictitious names, and plaintiff will seek leave of the court to amend this complaint when the true names and capacities have been ascertained.

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## BACKGROUND

Dr. Feied was a Lecturer and Head Advisor, working for REGENTS from fall of 1965 to and through June 1969. FEIED also worked as an Associate Professor at California State University, San Jose, from Fall of 1970 to and through August 31, 1975. FEIED later returned to work for REGENTS from Fall of 1976 through June 1978 as a Lecturer and Head Advisor of REGENTS' Division of Interdisciplinary and General Studies. Based on this employment history, FEIED qualified for retirement benefits under the California Public Employee's Retirement System ("PERS"), and also under the University of California Retirement Plan ("UCRP"). However, both PERS and UCRS refused to provide FEIED with his retirement benefits, though PERS ultimately acknowledged its error and commenced payment of FEIED's retirement sometime around the year 1996.

FEIED initiated administrative proceedings with REGENTS, which took place in the late 1990's. Initially REGENTS told FEIED that he was owed no benefits because a condition precedent had not been met. Specifically, REGENTS informed FEIED that it owed benefits to employees transferring in from State of California employment only if the transferring employees were also members of California's PERS program. As stated above, at that time FEIED was left off of PERS' retirement roll by way of an error of PERS, therefore the condition precedent for his qualification for UCRP was believed by UCRS to have not been met. However, because twelve years later PERS acknowledged its error and reinstated FEIED's retirement benefits, FEIED again pursued administrative proceedings on the new grounds

that PERS had erred, causing him to fail to meet the above-described condition precedent for qualification for UCRP benefits.

**(A) REGENTS'S DENIAL POST-PERS' ERROR CORRECTIONS**

In the administrative review FEIED initiated with REGENTS and UCRS in the late 1990's, REGENTS and UCRS initially informed FEIED that he did not qualify for UCRP benefits because in the year 1980 he had elected to buy-out his retirement benefits by taking a refund of his contribution.[2] (This shall be referred to as REGENTS' and UCRS' "buyout defense" throughout the remainder of this complaint.) However, FEIED pointed out that had such a refund been paid to him, it would have been the result of PERS' initial error in removing him off of its membership rolls, and the error had now been corrected. In response, REGENTS properly abandoned its "buyout defense," and turned to a substantive review of FEIED's qualifications under UCRS' retirement statute, known as "UCRP Article 12.08."

REGENTS and UCRS ultimately concluded that FEIED did not qualify for retirement benefits under UCRP

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At the time of drafting of this amended complaint, Plaintiff's counsel reviewed all of the documents provided to him by Plaintiff as well as by the defendants in the course of earlier discovery, and has not found any evidence of a refund of FEIED's contributions having been paid to him. Whether a refund had been paid, and the amount of the refund, shall be ascertained through discovery.

Article 12.08.[3] Specifically, REGENTS and UCRS concluded:

In order to establish reciprocity between the two systems, an employee must be employed and become an active member of the Plan within 180 days of termination of employment from the previous PERS employer... you were not employed with the University of California within 180 days after termination with [California State University San Jose], and, therefore not eligible for reciprocity.

After conclusion of this administrative review, FEIED finally relied upon the determination of REGENTS and UCRS and concluded he did not qualify for benefits. On this basis, FEIED did not pursue any further avenues of redress. However, approximately five years later FEIED was engaged in a discussion with an attorney regarding the matter, and in the course of those discussions FEIED and the attorney reviewed the matter once again and realized that REGENTS and UCRS had erred. The error is revealed as follows:

UCRP Article 12.08 reads in relevant part:

An employee who becomes an Active Member of this [UCRP] Plan within 180 days of termination of employment where such a Member was a member of PERS (except those employees who were members of

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[3] UCRP Article 12.08 is a regulation that establishes a reciprocity between the State of California's PERS program, and REGENTS' UCRP program. It extends retirement benefits to an employee coming into the University of California from a job sector under the State of California.

PERS on account of University employment) shall be entitled to the following provided that the contributions have remained on deposit with PERS and the Member retires concurrently under both plans: [recital of benefits]. [UCRP Article 12.08.]

The language in the parentheses of REGENTS' UCRP Article 12.08 facially states that an exemption applies to those individuals who were members of PERS on account of "University employment":
"[e]xcept those employees who were members of PERS on account of University employmen" [ UCRP Article 12.08 language in parentheses.][4]

The language in UCRP Article 12.08 contained in the parenthesis further specifically addressed the segment of the rule that stated an employee must become a member of UCRP "*within 180 days of termination of employment where such a Member was a member of PERS,*" and explained that this "180-day rule" would not even apply to any individual who became a member of UCRP after leaving an earlier "State of California" job from that unique sector called, "University employment." The language in parentheses further facially *excluded* persons who used to work for any state "University" from the "180-day" rule. Thus Under UCRP Article 12.08, there

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The words "University Employment" mean what they facially state. In other words the word "University" does not mean "the Regents of the University of California." The word "University" means "University," and San Jose State University was a "University."

were two different ways an individual could qualify for UCRP under Article 12.08:

**First Way**

"...an employee who becomes an Active Member of this Plan within 180 days of termination of employment where such a Member was a member of PERS" (though not as a University employee);

**-or-**

**Second Way**

"...employees who were members of PERS on account of **University employment**."

FEIED was an employee who was a member of PERS on account of University Employment, therefore the "180 day rule" set forth above did not apply to him, and he qualified for retirement benefits.

In addition to discovery of the error of REGENTS and UCRS described above, one additional basis for qualification transpired in the course of the above-stated Federal Court proceedings themselves, to wit: If REGENTS was deemed to have been an entity independent of the State of California, then REGENTS truly would not have been bound by the State of California's retirement program, precisely in the same manner that a private employer is unaffected by any aspect of State retirement programs. However, if REGENTS was deemed to have been an "arm of the State," as REGENTS had successfully established by judicial decree in the course of the Federal Court proceedings, particularly in relation to its administration of its retirement program, then it is clear that FEIED's time of employment with REGENTS was with the "State of California." On this basis alone, FEIED must be deemed to have qualified for

retirement benefits based on the full length of his employment with the "State of California," irrespective of which state job sector he was in. With respect to this argument, REGENTS now asserts that it is capable of being both "*the State of California*" as well as a corporate entity entirely "*independent of the State of California.*" REGENTS is incorrect, because while REGENTS is sometimes deemed one or the other, it can never both "*the State*" as well as "*independent of the State*" at the same time. There is a test, called the "Proprietary Functions Test," explained by the United States Supreme Court, which is used to determine whether a State agency is functioning in a "proprietary capacity" so as to exempt it from certain immunities applicable to "The State," or whether the agency is functioning as an "arm of the state" so that it enjoys the immunities of the state. The "Proprietary Functions Test" has also been adopted by California judicial authorities.

**(B) REGENTS' ERROR IN DENIAL OF BENEFITS REVEALED AND DISCOVERED APRIL 12, 2005**

On April 12, 2005 FEIED discovered, for the first time, that REGENTS had denied him benefits on the alleged grounds that he allegedly "*elected to receive a refund of all of his contributions*," essentially "buyout out" his retirement plan from REGENTS. (SEE exhibit A attached hereto.) However, REGENTS knew it has abandoned the "buyout defense" once PERS admitted to its error (because a buyout on the basis of PERS' error could not possibly have held up as an excuse after the error was discovered). In fact REGENTS' knowledge that it had abandoned its "buyout defense" is made unequivocally clear, because had the "buyout defense"

applied no matter what UCRP Article 12.08 stated, then REGENTS would never have conducted a substantive review to determine if FEIED qualified for benefits under UCRP Article 12.08. REGENTS' assertion that FEIED *"elected to receive a refund of all of his contributions"* (exhibit A) displays negligence to a degree verging on fraud. However, FEIED gives REGENTS the benefit of the doubt and therefore alleges only a negligence claim (infra). Moreover, there is no statute of limitations bar because FEIED did not know, and could not have known, that he had been denied benefits due to an alleged "buyout" of his plan until REGENTS informed him about it on April 12, 2005 in its letter (exhibit A). Because REGENTS now asserts that it has all along believed that FEIED bought out his retirement plan in 1980, and asserts that it continues to believe this is so even today, it would have made no difference at any point in time if FEIED ultimately prevailed in demonstrating to REGENTS that he qualified for retirement benefits under its retirement statute, UCRP Article 12.08, because the buyout would bar his entitlement regardless. The "buyout defense" is therefore omnipotent, but REGENTS failed to inform FEIED that it had denied him benefits on this basis until April 12, 2005. REGENTS is further estopped from arguing that FEIED knew of the "buyout defense" back in the 1980's or mid-1990's, because REGENTS had entirely abandoned the "buyout defense" at that time in recognition of the error that transpired with PERS.

## FIRST CAUSE OF ACTION FOR NEGLIGENCE

### 1. REGENTS/UCRS

Plaintiff incorporates by reference all of the general allegations and factual recitals contained above, and pleads as and for a FIRST cause of action as follows:

1. REGENTS and UCRS owed FEIED a duty to inform him of the actual reasons his retirement benefits had been denied, so as not to mislead him into a false reliance that it had examined all of the bases of his qualifications and that he did not qualify for payment of benefits.

2. REGENTS and UCRS breached their duties by (1) misinforming FEIED that he did not qualify for UCRP benefits; (2) informing him that their "buyout defense" had been abandoned on account of the above-described error with PERS; (3) failing to inform him that they never really abandoned their "buyout defense"[5]; and by denying him benefits due to the "buyout defense" they

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This may potentially be a fraud and deceit claim as well. Civil Code § 1709 states - *"One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."* Civil Code § 1710 further defines statutory deceit: *"The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; 3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact."* However, again erring on the side of caution, FEIED only asserts a claim for negligence.

had abandoned in the 1990's.

3. REGENTS' and UCRS' above-described breach of duties and negligence caused FEIED to believe no benefits were owed him and to cease from further petition for redress for several years. FEIED's reliance upon REGENTS' administrative conclusion was reasonable and justifiable. Further, because REGENTS and UCRS themselves did not know of their error, and in fact do not know of their error even today (exhibit A), then they are estopped from arguing that a reasonable plaintiff, similarly situated, would have known of the error at a date earlier than the date Plaintiff actually discovered REGENTS's and UCRS' error.

4. FEIED suffered damages due to REGENTS' and UCRS' above-described breaches and negligence in that he has lost his retirement benefits, including the present-day cash value of the benefits and losses, and a continued loss of benefits which is ongoing.

**2. PERS**

5. PERS owed FEIED a duty of reasonable care to act so as not to cause him financial injury and losses.

6. PERS breached this duty by leaving FEIED off of its retirement rolls for 12 years or more.

7. PERS' above-described breach and negligence caused REGENTS to deny FEIED benefits on grounds that the condition precedent for FEIED's qualification for UCRP benefits, requiring FEIED to have first been a member of PERS before applying for UCRP benefits, had not been met. Further, PERS' breach and negligence was the proximate cause of FEIED's having

allegedly *"elected to receive a refund of all of his contributions"* (exhibit A), the basis upon which REGENTS has denied FEIED benefits to this day.

8. As a result of PERS' negligence, FEIED suffered damages and losses in the loss of his retirement benefits, the present-day cash value of the benefits and losses he suffered, and a continued loss of benefits.

9. PERS' above-described breach and negligence further caused FEIED to incur substantial costs and attorney's fees in pursuing recovery of his benefits.

WHEREFORE, Plaintiff prays for a judgment against the defendants, and each of them, for all damages and retirement benefit losses suffered by Plaintiff, including a judgment for restitution and reinstatement of his benefits retroactively to the date of qualification, and further relief as further set forth below.

**SECOND CAUSE OF ACTION FOR INJUNCTIVE RELIEF DIRECTING PAYMENT OF STATUTORILY-OWED RETIREMENT BENEFITS**

Plaintiff incorporates by reference all of the general allegations and factual recitals and allegations contained above, and pleads as and for SECOND cause of action as follows:

10. REGENTS and UCRS have kept FEIED's own retirement monies for many years to date, and continue to deprive him of his own monies with each passing month such benefits are not paid.

WHEREFORE, FEIED respectfully prays for a judgment of injunctive relief prohibiting REGENTS and

UCRS from continuing to appropriate his monies, and mandating payment of same with all capitalization[6] and/or interest as appropriate under the law, including reimbursement for all medical expenses FEIED has had to pay for himself and his wife that should have been covered under the UCRP benefits, as further set forth below.

**PRAYER FOR DAMAGES, COSTS AND ATTORNEY'S FEES**

Plaintiff incorporates by reference all of the information contained above, and prays for judgment against Defendants, and each of them, as hereinafter set forth.

**FIRST CAUSE OF ACTION:**

1. Actual damages according to proof;

2. General damages according to proof;

3. Special damages according to proof;

4. Reimbursement of Attorney's fees and costs by PERS;

6. Costs of Suit; and

7. Such other and further relief as the Court deems proper.

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The term "capitalization" refers to the *present-day actual value* of monies owed. For example, $10,000 in the year 1980 may have had the same "buying power" of $50,000 in the year 2005 (for the sake of example only). The "capitalized" value of the $10,000 under this example is therefore $50,000.

**SECOND CAUSE OF ACTION FOR INJUNCTIVE RELIEF (REGENTS and UCRS):**

1. Reinstatement of FEIED's retirement benefits retroactively to the date of initial qualification, calculated at the present cash value of the monies withheld;

2. Injunctive relief prohibiting REGENTS and UCRS from withholding FEIED's retirement benefits;

6. Costs of Suit; and

7. Such other and further relief as the Court deems proper.

Dated: July 1, 2005

/S/

Andrew W. Shalaby,
Attorney for Plaintiff
Frederick Feied

This case was not selected for publication in the Federal Reporter.

United States Court of Appeals,

Ninth Circuit.

Frederick FEIED, Plaintiff-Appellant,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; et al., Defendants-Appellees.

No. 04-17523.

Argued and Submitted April 4, 2006.

Decided June 20, 2006.

Background: Retiree brought action under § 1983 against the Regents of the University of California, the California Public Employees' Retirement System (PERS), and their respective retirement administrators, alleging constitutional violations concerning the payment of retirement benefits. The United States District Court for the Northern District of California, Saundra B. Armstrong, J., dismissed the complaint, and retiree appealed.

Holdings: The Court of Appeals held that:

(1) cause of action under § 1983 accrued, and applicable one-year statute of limitations under California law began to run, when defendants allegedly unconstitutionally denied retiree contested retirement benefits, and

(2) Regents were arms of the state, and, thus, they had Eleventh Amendment immunity.

Affirmed.

Most Cited Cases

Regents of the University of California were arms of the state, and, thus, they had Eleventh Amendment immunity from retiree's action under § 1983, alleging constitutional violations concerning the payment of retirement benefits. U.S.C.A. Const.Amend. 11; 42 U.S.C.A. § 1983.

*559 Andrew W. Shalaby, Esq., El Cerrito, CA, for Plaintiff-Appellant.

Eric Behrens, Esq., University of California Office of the General Counsel, Oakland, CA, Susan J. King, DAG, Office of the California Attorney General, San Francisco, CA, for Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California, Saundra B. Armstrong, District Judge, Presiding. D.C. No. CV-04-02618-SBA.

Before: FERGUSON, TROTT, and KLEINFELD, Circuit Judges.

MEMORANDUM FN*

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

**1 Frederick Feied appeals the District Court's dismissal of his 42 U.S.C. § 1983 action against the Regents of the University of California (Regents), the California Public Employees' Retirement System (PERS), and their respective retirement *560 administrators for alleged Fifth and Fourteenth Amendment violations concerning the payment of retirement benefits. We affirm the District Court's dismissal on the basis that Feied's claims are time-barred. With respect to the Regents, Feied's claims are also barred by the Eleventh Amendment.

We review de novo the dismissal of an action for failure to file within the applicable limitations period. Silva v. Crain, 169 F.3d 608, 610 (9th Cir.1999). We review questions of law de novo, United States v. Ziskin, 360 F.3d 934, 938 (9th Cir.2003), such as whether an entity is entitled to Eleventh Amendment immunity, Doe v. Lawrence Livermore Nat'l Lab., 131 F.3d 836, 838 (9th Cir.1997).

I.

Feied filed his § 1983 action with the District Court on June 29, 2004. Section 1983 claims are characterized as personal injury claims. Silva, 169 F.3d at 610. The statute of limitations for personal injury claims in California is two years. Cal.Civ.Proc.Code § 335.1 (West 2006). Prior to January 1, 2003, the applicable limitations period was one year. Cal.Civ.Proc.Code § 340(3) (West 1982), amended and redesignated by 2002 Cal. Stat. ch. 448 § 3. We examine when Feied's § 1983 action accrued to determine which limitations period applies, and whether that limitations period had run by the time Feied filed his complaint in 2004.

[1] A § 1983 action accrues when the party "knows or has reason to know of the injury which is the basis of the action." Elliott v. City of Union City, 25 F.3d 800, 802 (9th Cir.1994) (internal quotation marks omitted). The basis for Feied's action is the Defendants' allegedly unconstitutional denial of contested retirement benefits. At the latest, Feied knew of this injury in 1996, when PERS refused to pay Feied contested interest/capitalization as part of its final award to him of retirement benefits. By 1996, the Regents had also clearly conveyed to Feied their position that he was ineligible for retirement benefits and that no payments from them would be forthcoming. Nothing that has occurred in the interim, such as the California state court's dismissal of Feied's 2002 contract suit against the same Defendants, enhances the Defendants' original injury or creates a new injury attributable to the Defendants that could have the effect of restarting the clock. Since Feied waited until 2004 to challenge the Defendants' 1996 denial of benefits as unconstitutional, his § 1983 action is time-barred under the one-year statute of limitations in effect in 1996. Cal.Civ.Proc.Code § 340(3) (West 1982) (amended 2002).

Feied argues unavailingly that his § 1983 action accrued not in 1996, but rather at the conclusion of the contract suit that he filed in state court in 2002 against the Regents and PERS. Feied contends that the relevant § 1983 injury is the Defendants' unconstitutional "subjection" of his state court suit to a time bar. This claim is without merit. The Defendants did not "subject" Feied's contract suit to a time bar-they merely complied with the state court's ruling that Feied's suit was time-barred. In so complying, the Defendants did not violate any federal laws or otherwise deprive Feied of his constitutional rights. As such, Feied's claim that the outcome of the state court suit forms the basis of his § 1983 action fails on its face. See 42 U.S.C. § 1983 (providing for a cause of action when the defendant acts under color of state law to deprive the plaintiff of his federal rights ).

II.

**2 [2] With respect to the Regents, Feied's action is also barred by the Eleventh*561 Amendment, which prohibits suits against states by their citizens, Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), and by citizens of other states or foreign countries, U.S. Const. amend. XI. Under the Eleventh Amendment, the State of California is generally immune from § 1983 suits, as are any entities considered to be an "instrumentality" or "arm" of the state. BV Eng'g v. Univ. of Cal., L.A., 858 F.2d 1394, 1395 (9th Cir.1988).

This Court has repeatedly held that the Regents are an arm of the state entitled to Eleventh Amendment immunity. E.g., Armstrong v. Meyers, 964 F.2d 948, 949-50 (9th Cir.1992); Thompson v. City of L.A., 885 F.2d 1439, 1443 (9th Cir.1989); BV Eng'g, 858 F.2d at 1395; Jackson v. Hayakawa, 682 F.2d

1344, 1350 (9th Cir.1982). Despite this line of cases, Feied contends that the Regents are not entitled to immunity in his case. In support of this position, Feied emphasizes the substantial organizational and administrative autonomy that the Regents enjoy.

Feied's argument is foreclosed by Doe v. Lawrence Livermore Nat'l Lab., in which this Court held that the "single most important factor" in assessing whether an entity is an arm of California is not the degree of administrative autonomy the entity enjoys, but whether the State of California is ultimately legally liable for a judgment against the entity. See 131 F.3d at 838-39. In Doe, we recognized that the Regents enjoy substantial autonomy, see 65 F.3d 771, 775 (9th Cir.1995), but went on to hold that because the dispositive inquiry is California's legal liability for the Regents, "the University is an arm of the State of California," 131 F.3d at 839 (on remand from the Supreme Court). Accordingly, Feied's contention that the Regents are not entitled to Eleventh Amendment immunity due to their administrative autonomy fails.

Feied makes two additional arguments countering the Regents' claim of Eleventh Amendment immunity: first, that the Regents are judicially estopped from claiming to be an arm of California based on their position in the 2002 state court proceedings; and second, that the Ex parte Young exception to Eleventh Amendment immunity applies in this case. See 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). We reject both of these arguments for the reasons well-stated in the District Court opinion.

For the foregoing reasons, we uphold the District Court's dismissal of Feied's § 1983 action as time-barred, and find in

the alternative that his claims against the Regents are barred under the Eleventh Amendment.

AFFIRMED.

SUPREME COURT
FILED
JUN - 9 2004
Frederck K. Ohlrich Clerk
DEPUTY

Court of Appeal, First Appellate District, Div. 4 - No. A102968

**S123806**

# IN THE SUPREME COURT OF CALIFORNIA

**En Banc**

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FREDERICK FEIED, Plaintiff and Appellant,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

et al., Defendants and Respondents.

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Petition for review DENIED.

The request for an order directing publication of the opinion is denied.

**GEORGE**
Chief Justice

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

Court of Appeal, First District, Division 4, California.

Frederick FEIED, Plaintiff and Appellant,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents.

No. A102968.

(Alameda County Super. Ct. No. 2002053902).

March 2, 2004.

Review Denied June 9, 2004.

Andrew W. Shalaby, El Cerrito, CA, for Plaintiff-Appellant.

Eric K. Behrens, Oakland, CA, Julia Yeang-Ha Je, Ofc Attorney General, San Francisco, CA, for Defendant-Respondent.

KAY, P.J.

*1 Plaintiff Frederick Feied appeals from the order dismissing his first amended complaint after the trial court sustained general demurrers and motions for judgment on the pleadings by defendants Regents of the University of California (Regents) and the California Public Employees' Retirement System (PERS). We affirm.

## BACKGROUND

The motions for judgment on the pleadings were identical in effect to the general demurrers; both test the sufficiency of plaintiff's complaint. Our review therefore gives the complaint a reasonable interpretation, accepting the factual correctness of its allegations, but not conclusions, contentions, or deductions. (Code Civ. Proc., § 438, subd. (d); Board of Regents v. Davis (1975) 14 Cal.3d 33, 37, fn. 4, 120 Cal.Rptr. 407, 533 P.2d 1047; Fiol v. Doellstedt (1996) 50 Cal.App.4th 1318, 1323, 58 Cal.Rptr.2d 308.) Plaintiff alleged three causes of action.

The first was for breach of contract.FN1 Plaintiff alleged that he was a UC employee for two periods, from 1965 through 1969 and from 1976 through 1978, and was thereby covered by the University of California Retirement Plan (UCRP). From 1970 through 1975, he was an associate professor at a state university and thus "an employee under an employment contract with The State of California and entitled to retirement plan benefits under PERS." From 1965 through 1978 plaintiff "entered

into respective contractual relationships with The Regents and PERS, under which he rendered higher educational services ··· in exchange for a salary, and in exchange for retirement benefits····" Plaintiff "performed all his duties pursuant to the ··· employment contracts with The Regents and with PERS" until he "left the employ" of the state university (which was covered by PERS) in 1975, and the University of California in 1978, "and was entitled to receipt of retirement benefits under PERS and UCRP accordingly." Plaintiff alleged on information and belief that "PERS and The Regents ··· are one and the same defendant···· [¶] ··· [¶] The Regents refused to provide Dr. Feied with retirement benefits under UCRP, hence breaching its contractual duties. [¶] PERS initially refused to provide Dr. Feied with his PERS retirement benefits. However, after a lengthy administrative review process, Dr. Feied's right to his PERS pension was established by PERS' administrative review board in 1996. Accordingly, in or about March 1996, PERS paid Dr. Feied a gross amount of approximately $29,390.59 retroactively for retirement benefits it had erroneously denied him since about 1984, although it failed to pay interest or capitalization on the retroactive payments. [¶] Dr. Feied had established his right to his pension in 1996, and was told by PERS that it would make him whole. PERS honored its word in part, by paying Dr. Feied retroactively for the benefits it had deprived him of for more than twelve years. However, PERS did not make Dr. Feied whole, because it failed to pay him the interest and capitalization on the retroactive payments. [¶] It appears that PERS is not willing to pay Dr. Feied his interest and capitalization on his wrongfully denied benefits. Accordingly, PERS has breached its contract. [¶] Dr. Feied

has suffered actual, general, special, and consequential damages from the date of The Regents' initial breach, to and through this present day, and will continue to suffer said damages until his retirement benefits are reinstated, including all related pecuniary losses. [¶] Dr. Feied has suffered actual, general, special, and consequential damages from the date of PERS's initial breach, primarily in relation to his loss of interest and capitalization on the aforementioned money not paid for several years, continues to lose the benefits of the unpaid interest to present, and will continue to suffer said losses until the money is paid."

FN1. Although it is not mentioned by the parties, a question as to the status of the pleadings requires a brief comment. After plaintiff filed his original complaint, both the Regents and PERS interposed general demurrers. The trial court overruled the Regents' demurrer as to plaintiff's first cause of action, but it sustained the PERS demurrer with leave to amend. Plaintiff then filed a first amended complaint for his breach of contract cause of action. In accordance with the rule that an amended pleading supersedes the original pleading (e.g., Foreman & Clark Corp. v. Fallon (1971) 3 Cal.3d 875, 884, 92 Cal.Rptr. 162, 479 P.2d 362; Grell v. Laci Le Beau Corp. (1999) 73 Cal.App.4th 1300, 1307, 87 Cal.Rptr.2d 358), we summarize the allegations from plaintiff's amended complaint as they state his cause of breach of contract.

*2 Plaintiff's second cause of action was for "Damages Under California Welfare [and Institutions] Code § 15610.30," which governs the bad faith interference with

property rights of the elderly. It incorporated the allegations of the first cause of action and alleged that the acts of "The Regents and The State in depriving Dr. Feied of his retirement benefits and accrued interest constitute a violation" of this statute.

Plaintiff's third cause of action was for "Damages under Cal. Civ.Code § 3345," which authorizes punitive damages against those who use unfair or deceptive acts, methods, or practices against "senior citizens." Plaintiff alleged that the same acts also constituted a violation of this statute.

## REVIEW

### Plaintiff's Breach of Contract Cause of Action against the Regents

Contrary to plaintiff's allegation, the Regents and PERS are not "one and the same defendant." The University of California is a constitutional entity vested with autonomy from most rules and legislation applicable to private persons and entities. As its governing body, the Regents have virtually plenary authority to formulate policy and to administer the university without interference from the Legislature. (Cal. Const., art. IX, § 9; San Francisco Labor Council v. Regents of University of California (1980) 26 Cal.3d 785, 788-789, 163 Cal.Rptr. 460, 608 P.2d 277; Regents of University of California v. City of Santa Monica (1978) 77 Cal.App.3d 130, 135-136, 143 Cal.Rptr. 276; Ishimatsu v. Regents of University of California (1968) 266 Cal.App.2d 854, 864, 72 Cal.Rptr. 756.) The

UCRP is one of the matters controlled and operated by the Regents. (See Creighton v. Regents of University of California (1997) 58 Cal.App.4th 237, 241-242, 68 Cal.Rptr.2d 125.) The UCRP is a separate program not connected to PERS. (See Gov.Code, § 20301 ["any person who ··· is employed by the university, and is a member of any retirement system maintained by the university ··· shall be excluded from membership in this system (i.e., PERS)."].)

Given the university's constitutional independence from ordinary legislation, it is not surprising that neither plaintiff nor the Regents point to a specific statute as establishing a limitations period for commencing an action for accrued but unpaid pension benefits under the UCRP. Attacking the trial court's conclusion that this cause of action "accrued-at the latest-in 1996, and is therefore time-barred under any applicable statute of limitations," plaintiff contends that there is no limitations period for someone in his situation. He reasons that the Regents and PERS have entered into a "reciprocity agreement" whereby, as he explains it, if certain conditions are met, a UC employee will qualify for retirement benefits under the UCRP if the employee was previously a member of another State retirement plan, specifically PERS. Plaintiff contends that as a consequence of reciprocity, the parties come under the rules and statutes governing the PERS system. (See Gov.Code, § 20353.) The normal period to bring an action against PERS is three years, but there is a statutory exemption applying to adjustments for errors and omissions "where this system [i.e., PERS] owes money to a member or beneficiary." FN2 Plaintiff thus concludes that "retirement benefits are exempted from the statute of

limitations."

FN2. The quote is from Government Code section 20164. Subdivision (a) of this statute provides, among other things, that the obligations of PERS and "contracting agencies" to "retired members continue throughout the lives of the ··· retired members, and thereafter until all obligations ··· have been discharged." It is subdivision (b) which has the language quoted in the text. As pertinent here, subdivision (b) provides: "For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions ··· the period of limitation of actions shall be three years, and shall be applied as follows: [¶] (1) In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment. [¶] (2) In cases where this system owes money to a member or beneficiary, the period of limitations shall not apply." (Italics added.)

*3 The Regents do not respond to plaintiff's reciprocity argument except to note correctly that it was not alleged in either the original or the amended complaint. Their approach is to rely on the rule that their internal policies "enjoy a status equivalent to that of state statutes" ( Regents of University of California v. City of Santa Monica (1978) 77 Cal.App.3d 130, 135, 143 Cal.Rptr. 276; Apte v. Regents of University of California (1988) 198 Cal.App.3d 1084, 1090, 244 Cal.Rptr. 312), and thus plaintiff is subject to the three-year limitation period established for "[a]n action upon a liability created by statute" (Code Civ. Proc., 338, subd. (a)). As an

alternative, the Regents argue that "if the UCRP is considered a contract, the four year statute of limitations for an action based on a written contract applies under ··· Code of Civil Procedure section 337."

A fair reading of plaintiff's complaint is that, unlike PERS, the Regents have never made any pension payments to him ("The Regents refused to provide Dr. Feied with retirement benefits under UCRP").FN3 The complaint does not expressly provide a date on which plaintiff was entitled to receive payments under the UCRP. As the Regents point out, however, plaintiff does allege that PERS 'erroneously denied him [retirement benefits] since about 1984,' eighteen years before he filed his original Complaint on June 10, 2002. He also alleges that he 'was entitled to receipt of retirement benefits under ··· UCRP' when he 'left ··· the employ of The Regents in the year 1978.' Thus, whether his alleged entitlement to retirement benefits accrued in 1978 or in 1984, it certainly accrued well outside the three year statute of limitations applicable to claims based on statute ( Code of Civ. Proc. § 338(a)) or the four year statute of limitations applicable to breach of contract claims ( Code of Civ. Proc. § 337)." The cause of action against the Regents was time barred and the trial court did not err in reaching the same conclusion.FN4

FN3. This was made explicit at the oral argument on the trial court's tentative ruling to grant the Regents' motion for judgment on the pleadings. When asked by the trial court to characterize the breach of contract cause of action, plaintiff's counsel responded that the claim was that the "Regents to date [have] not paid Dr. Feied his retirement

benefits that are rightly owed ··· just flat out not paying····"

FN4. When asked at oral argument plaintiff's counsel confirmed that the accrual date was on or about 1984. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 665, subd. (c), p. 698.)

Plaintiff's Breach of Contract Cause of Action against PERS

Unlike his claim against the Regents, plaintiff is not claiming that PERS has failed to pay him any part of the pension to which he is entitled. A fair reading of the amended complaint is that PERS has been making payments to plaintiff since early 1996, following "a lengthy administrative review process." Plaintiff is seeking his "interest and capitalization" "retroactively for retirement benefits [PERS] had erroneously denied him since about 1984." 1996 is clearly established as the year in which his claim accrued. Plaintiff contends that he and persons similarly situated are "exempted" from any statute of limitations by Government Code section 20164, subd. (b)(2) (quoted in fn. 2, ante.)

PERS contends that the section applies only to claims against PERS based upon errors or omissions, and that this claim is neither. Hence, it is barred by either the three-year period established by Code of Civil Procedure section 338, subdivision (a) or the four-year term prescribed by Code of Civil Procedure sections 337 or 343.

*4 We agree. Plaintiff's reliance on Government Code section 20164 is misplaced. That statute appears in Article 4 (§§ 20150-20164) of Chapter 2 ( id., § 20090 et seq.) of the Public Employees' Retirement Law ( id., § 20000 et seq.). Article 4 deals with "Correction of Errors and Omissions." It is undisputed that plaintiff has been receiving pension payments from PERS since 1996, following completion of what plaintiff admits was "a lengthy administrative review process." Fixing the amount of those payments was clearly the measured result of a deliberate decision-making process. The refusal to pay interest or capitalization cannot be characterized as either an error or an omission. Section 20164, and its subdivision (b)(2), consequently does not apply. Plaintiff's claim against PERS was not commenced until June of 2002, at least 66 months after the payments started. Plaintiff's cause of action is thus time-barred, as the trial court correctly concluded.

Plaintiff's Second Cause of Action under Welfare & Institutions Code section 15610.30

The cited statute is a part of the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst.Code, §§ 15600-15660). It is one of the act's definitional statutes, stating what constitutes "financial abuse" of a person protected by the act.FN5 Our Supreme Court has stated that the general goal of the act "is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." ( Delaney v. Baker (1999) 20 Cal.4th 23, 33, 82 Cal.Rptr.2d 610, 971 P.2d 986 .) Recognizing "the special

vulnerability of the elderly and those who are either disabled or for some other reason dependent upon others for their personal or financial care" ( Community Care & Rehabilitation Center v. Superior Court (2000) 79 Cal.App.4th 787, 792, 94 Cal.Rptr.2d 343), the Legislature stated that the purposes of the act are to collect information on elder abuse, to "[r]equire health practitioners, care custodians, clergy members, and employees of county adult protective services agencies and local law enforcement agencies tc report known or suspected cases of abuse," and to protect those who do report suspected instances of abuse. ( Welf. & Inst.Code, § 15601.)

FN5. "(a) 'Financial abuse' of an elder or dependent adult child occurs when a person or entity does any of the following: [¶] (1) takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both. [¶] (2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both .[¶] (b) A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, or retains possession of property in bad faith. [¶] (1) A person or entity shall be deemed to have acted in bad faith if the person or entity knew or should have known that the elder or dependent adult had the right to have the property transferred or made readily available to the elder or dependent adult or to his or her representative. [¶] (2) For purposes of this section, a person or entity should have known of a right specified in paragraph (1) if,

on the basis of information received by the person or entity ··· it is obvious to a reasonable person that the elder or dependent person has a right specified in paragraph (1)····" (Welf. & Inst.Code, § 15610.30.)

It is Welfare and Institutions Code section 15657 which provides that "[w]here it is proven by clear and convincing evidence that a defendant is liable for ··· financial abuse as defined in Section 15610.30, and that the defendant has been guilty of recklessness, oppression, fraud or malice in the commission of this abuse" the plaintiff may recover costs and attorney fees "in addition to all other remedies otherwise provided by law."

Although it may be so, the face of the complaint does not establish that plaintiff is either elderly or a dependent adult (terms which are defined in Welf. & Inst.Code, §§ 15610.27 & 15610.23, respectively). Moreover, plaintiff did not and cannot allege that either the Regents or PERS was responsible for his physical care or managing his financial affairs. He did not allege that his situation has been, or should have been, reported to any official agency. The situation is, in short, one where a person who must be presumed competent is having a dispute about money he claims he is owed by two state pension schemes. We agree with the trial court that plaintiff failed to state a cause of action. The general demurrers were therefore properly sustained without leave to amend.

Plaintiff's Third Cause of Action under Civil Code section 3345

*5 The only reported decision considering this statute describes its operation as follows: "[T]his statute allows for the trebling, in certain cases involving senior citizens and disabled individuals, of fines or penalties which are otherwise 'authorized by statute.' " FN6 ( Sanchez v. Monumental Life Ins. Co. (9th Cir.1996) 102 F.3d 398, 405.) There is no statute authorizing or underpinning plaintiff's breach of contract claim; its basis is purely common law. There is consequently no statute authorizing fines or penalties, the predicate for invoking Civil Code section 3345. The Elder Abuse and Dependent Adult Civil Protection Act does include statutes authorizing fines and other monetary remedies. ( Welf. & Inst.Code, §§ 15656, 15657, 15657.05.) The preceding discussion, however, has shown that plaintiff pleaded no cause of action based on that act. The general demurrers were therefore properly sustained without leave to amend with respect to this cause of action.

FN6. The core of the statute is subdivision (b), which provides in pertinent part: "Whenever a trier of fact is authorized by a statute to impose either a fine, or a civil penalty or other penalty, or any other remedy the purpose or effect of which is to punish or deter, and the amount of the fine, penalty, or other remedy is subject to the trier of fact's discretion, the trier of fact shall consider all of the following factors, ··· in determining the amount of fine, civil penalty or other penalty, or other remedy to impose. Whenever the trier of fact makes an affirmative finding in

regard to one or more of the following factors, it may impose a fine, civil penalty or other penalty, or other remedy in an amount up to three times greater than authorized by the statute, or, where the statute does not authorize a specific amount, up to three times greater than the amount the trier of fact would impose in the absence of that affirmative finding····" (Civ.Code, § 3345, subd. (b), italics added.)

Plaintiff's final argument is that Judge Richman, who granted the motions for judgment on the pleadings, was guilty of bias. There is absolutely nothing in the record before us to substantiate this claim.

The judgment is affirmed.

We concur: SEPULVEDA and RIVERA, JJ.